U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 22Aug2001

CASE NO.: 2000-STA-48

In the Matter of:

JOZEF WROBEL,
Complainant

v.

ROADWAY EXPRESS, INC.,
Respondent

Appearances:

Paul Taylor, Esquire
For the Complainant

Jerome Schad, Esquire
For the Respondent

BEFORE: Michael P. Lesniak
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of § 405 of the Surface Transportation Assistance Act of 1982 (hereinafter "the Act" or "STAA"), as amended and recodified, 49 U.S.C. § 31105 (1994) and the regulations at 29 C.F.R. Part 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

PROCEDURAL HISTORY

On July 16, 1999, Complainant Jozef Wrobel (hereinafter "Wrobel" or "Complainant") filed a timely complaint with the Department of Labor's Occupational Safety and Health Administration (hereinafter "OSHA") pursuant to 29 C.F.R. § 1978.102 (1999). He claimed that Respondent Roadway Express, Inc. (hereinafter "Roadway" or "Respondent") violated § 405 when it discharged him on June 2, 1999 for refusal to drive when ill.

In accordance with 29 C.F.R. § 1978.104, OSHA's Assistant Secretary issued written findings on June 23, 2000, concluding the complaint was without merit. Complainant filed timely objections to the Assistant Secretary's written findings and requested a hearing under 49 U.S.C. § 31105 (b)(2)(B) and 29 C.F.R. § 1978.105.

A hearing on the merits was held in Buffalo, New York on June 5-6, 2001. Complainant presented his own testimony, and Respondent presented the testimony of four employees.[1] In addition, Complainant offered exhibits 1 through 9 and Respondent offered exhibits 1 through 12. Complainant's exhibits 1-9 and Respondent's exhibits 1-4, 6-10 and 12 were admitted into evidence without objection.[2]

FACTS

Stipulations

The parties agreed to, and I accepted, the following stipulations of fact:

1. The U.S. Department of Labor, Office of Administrative Law Judges has jurisdiction over the parties and the subject matter of this proceeding. (TR 6).

2. Complainant is an "employee" as defined in 49 U.S.C. § 31101(2). (TR 6).

3. Respondent is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act, 49 U.S.C. § 31105. (TR 5-6).

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[1] Mr. Joseph Moeser testified about the procedure of the grievance proceedings (before local, state and regional committees) under the National Master Freight Agreement and New York State Supplemental Agreement. (TR 168-190). Counsel for Roadway presented this witness to preserve for appeal the issue of whether the grievance proceedings are binding on the ALJ. Since Mr. Moeser's testimony is not probative as to the issue before me, his testimony will not be summarized.

[2] The following abbreviations have been used in this opinion: CX = Complainant's exhibit, RX = Respondent's exhibit and TR = Transcript of the hearing.

4. Since March 27, 1988, Respondent has employed Complainant to operate commercial motor vehicles with a gross vehicle rating of 10,001 pounds or more on the highways in interstate commerce. (TR 5-6).

5. On or about July 16, 1999, Complainant filed a complaint with the Secretary of Labor alleging that the Respondent had discriminated, disciplined and discharged him in violation of 49 U.S.C. § 31105. This complaint was timely filed. (TR 5-6).

6. On or about June 23, 1999, the Secretary of Labor, by Regional Administrator Patricia K. Clark, issued findings and an order. Complainant filed and served objections to the findings and order on July 3, 1999. Complainant's objections were timely filed. (TR 6).

7. Complainant lost $3,228.40 in wages when he served a two-week suspension in August of 1999. (TR 108).

Jozef Wrobel's Testimony

Jozef Wrobel has been a truck driver for almost thirty years (TR 43), and has been a driver for Roadway for over 13 years. (TR 44). His seniority with the company allows him to bid on runs. In January of 1999, Wrobel bid on the Buffalo-to-Boston run,[3] and was one of ten drivers assigned to that run. The Buffalo-to-Boston run takes nine and one-half hours to drive (TR 57), and three round trips are made per week. Wrobel's work week begins on Monday at 6 p.m., and his usual day off is Sunday.

Wrobel testified that he began to see Dr. Christopher, a chiropractor, in April of 1999 because he was experiencing back pain and could not sleep. (TR 44). Wrobel had set up twenty appointments with Dr. Christopher, two per week, for treatment for his back. (TR 98). Also, Dr. Kowletski, Wrobel's family physician, prescribed Carisprodol (a muscle relaxer) to Wrobel in April of 1999, which he took when he was unable to sleep. (TR 46; CX 1; RX 3). Wrobel testified he was taking the Carisprodol through May 28, 1999. (TR 51-52).

On May 26, 1999, Wrobel began his second weekly Buffalo-to-Boston run. When Wrobel arrived in Boston on May 27, 1999, he got a hotel room to sleep. However, he was unable to sleep because he had back pain. (TR 56). At 5 a.m. on May 28, 1999 (a Friday), he returned to Buffalo

[3] The bid run is actually from Roadway's West Seneca terminal near Buffalo, New York to North Reading, Massachusetts.

and told the dispatcher on duty that he was short of hours. (TR 57). He also turned in his chit card,[4] which indicated he had only 5.25 available hours to drive on Friday. (TR 115; RX 1). This meant he could not start his run at 6 p.m. without violating the federal regulation.[5] (TR 119). However, he did have enough hours on Saturday, so that he could have started his run one hour later and made it back to Buffalo the next day without violating the federal regulation. (TR 121). Wrobel testified that when he turned in his chit card at 5 a.m. on Friday, he did not intend to drive again until Monday because he did not have enough hours. (TR 125). Wrobel then went home, and was told to call the dispatcher at 2 p.m. (TR 60).

At 2 p.m. on May 28, 1999, Wrobel called Tom Ryan (hereinafter "Ryan"), a relay coordinator at Roadway, and told Ryan he was low on hours. (TR 68). At that point, Wrobel had only slept two or three hours because of his back pain. (TR 68). Ryan told Wrobel that he needed to be available to work his hours, and if he could not drive his normal run because he was low on hours, then he would need to be available for extra board work. (TR 69). Wrobel testified it would be a violation of his seniority to start his bid run one hour later because he bid on a 6 p.m. run, not a 7 p.m. run. (TR 70-71, 123). Wrobel testified that it was his understanding that he did not have to drive and could stay home when he was low on hours. (TR 124). Wrobel then told Ryan that he did not want to call in sick because the last two times he called in sick he was suspended. Wrobel said he did not want to work that night, and if Ryan would let him stay home because he was low on hours, then he would not take a sick day. (TR 69). Ryan told Wrobel for a second time that he had to be prepared to work his available hours since it was a holiday weekend (Memorial Day) and every available driver was needed, and then Wrobel told Ryan "I have no choice, I am sick, take me out of service, I am going to see my doctor," which ended the conversation. (TR 69).

Wrobel then went to see Dr. Christopher for his regularly scheduled appointment for back pain treatment, and he told Dr. Christopher that he had back pain, he could not sleep, he was tired and he had a headache. (TR 98). Dr. Christopher gave Wrobel a note to excuse him from work from May 28 to May 30, 1999. (TR 99). Wrobel believes he could not have safely driven a commercial vehicle on May 28, 1999. (TR 101). However, Wrobel was feeling better on Sunday, and called Roadway on May 30, 1999 at 9 a.m. (TR 100). Wrobel did not return to work until May 31, 1999, for his regularly scheduled bid run. (TR 100). On June 2, 1999, Wrobel received a discharge note. (TR 54).

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[4] A chit card is a card filled out by the driver which indicates his available driving hours. (TR 115). *See* RX 1 for a copy of the chit card turned in by Wrobel on May 28, 1999, indicating he has 5.25 hours to drive for May 28, 1999 and 9.25 hours for May 29, 1999.

[5] 49 C.F.R. § 395.3(b)(2) states: No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

Raymond Tangent's Testimony

Raymond Tangent (hereinafter "Tangent") is a relay manager for Roadway. (TR 194). Tangent has been a relay manager for Roadway since 1996 (TR 194), and has been a Roadway employee for 28 years. (TR 208). Tangent first explained that drivers get to "bid" on bid runs twice a year. (TR 195). Drivers bid on bid runs based on seniority, and usually the most senior drivers choose bid runs because they have specified start times and specified days off. (TR 195, 202). Drivers who do not have a lot of seniority are extra board drivers. These drivers are placed on a list every Sunday based on seniority and are given assignments with only two hours' notice. (TR 201).

Tangent next testified that a bid run is only cancelled if there is nothing to deliver. (TR 204-205). When the company cancels the bid, then the driver has the option to either not work or to go to the top of the extra board driver list. (TR 206). In the case of Wrobel's bid run on May 28, 1999, the run was not cancelled; instead, another driver completed the run. (TR 205). Tangent explained that when the bid driver does not have enough hours to complete his run, Roadway first looks to see if there is another driver (i.e., an extra board driver) available at 6 p.m. to make the run. If there is another driver available, then the bid run goes to that driver. (TR 211). However, if no other driver is available at 6 p.m., then Roadway can ask the bid driver to begin his run at a later time so that the bid driver does not violate the 70-hour rule. Based on the local work rule, the bid driver has to be available to work his available hours; he cannot refuse to come in later or to work a different run. (TR 210-211). In this case, there was no other driver available at 6 p.m., so Roadway had a right to call Wrobel in at 7 p.m. to drive his run. (TR 211, 213).

Tangent testified that he begins work at 7 a.m. every morning, and one of the first things he does is goes to the driver board to find out who is available to drive for the day. (TR 214-216). When Tangent arrived at work on May 28, 1999, he found Wrobel's chit card under "out of service" and noted that written on the chit card was "low hours will call at 1400." (TR 216-217). Tangent then spoke with Ryan, and told him to tell Wrobel that there were no drivers to take his run at 6 p.m., so just start his run one hour later to avoid violating the federal regulation. (TR 217). After Ryan spoke with Wrobel at 2 p.m. and reported the conversation back to Tangent, Tangent told Ryan to prepare "a notice of warning or notice of discipline for failure to make your shift or attendance infraction." (TR 218). At this time, Tangent knew that Wrobel was alleging he was sick, but did not know why he was sick. (TR 241).

Tangent testified that the dispatcher writes up the disciplinary violation, but then he reviews the violation before it is issued. (TR 224). Tangent testified that in reviewing a violation, he will talk to the dispatcher, review the employee's work record, and review any other pertinent facts before making a decision. (TR 226-227). He also testified that he will not issue discipline until after the driver has had an opportunity to submit a doctor's note explaining why the driver was off sick. (TR 244). In this case, Tangent based his decision to discharge Wrobel on the fact that Wrobel never indicated to Roadway what his illness was, Wrobel only claimed he was ill after he was told by Ryan he had to

work his available hours Friday night and from past experience he knows Wrobel "will say or do anything to make his agenda happen." (TR 242-243). Tangent also testified that Wrobel could have taken a sick day on May 28, 1999, according to the sick day and absenteeism policy for the Buffalo terminal: "an employee who reports off work sick at least two hours prior to his/her scheduled shift time will receive a sick day and be paid for that day as such." (RX 10, para. 2; TR 246). However, under the union contract,[6] Roadway cannot force a driver to take a sick day. (TR 266). If Wrobel had taken a sick day for May 28, 1999, then he would not have needed to provide Roadway with a doctor's note (TR 254) and he would not have been disciplined. (TR 292).

Finally, Tangent testified that Wrobel had extended his weekends twelve times over the past year. (TR 236-237). Wrobel was able to extend his weekends by booking off[7] for either being sick or being low on hours. (TR 289). Tangent testified that the other nine drivers on the same bid run do not have the same pattern of extending weekends. (TR 290-291).

Thomas Ryan's Testimony

Thomas Ryan is a relay coordinator at Roadway. (TR 316). On May 28, 1999, Ryan spoke with Tangent about Wrobel's low hours. Tangent told Ryan to tell Wrobel to start his bid at 7 p.m. instead of 6 p.m. (TR 317) since he had enough hours to complete his run between May 28 and May 29, 1999. Wrobel called in around 2 p.m. and said he did not have enough hours to begin his run, and thus would not be available to work that weekend. (TR 318). Ryan told Wrobel that Roadway needed him to work as soon as he had enough hours. (TR 318). When Wrobel said his low hours disqualified him from work that weekend, Ryan told Wrobel that Roadway was anticipating a busy weekend and needed every available driver to work. (TR 318-319). Wrobel then said he wanted to be off that weekend, he was sick, and then hung up the phone. Wrobel did not explain how he was "sick." (TR 319). Ryan then conveyed the conversation to Tangent and wrote up a disciplinary letter for Wrobel not being available. (TR 319).

Kevin Pagliei's Testimony

Kevin Pagliei is a relay dispatcher for Roadway. (TR 324). When Wrobel returned to work on May 31, 1999, Pagliei gave Wrobel a pay request slip for his sick day. (TR 326). Wrobel told Pagliei that he was not eligible for sick days. (TR 327). Pagliei then signed Wrobel's sick note and sent an e-mail to Tangent about the incident. (TR 325-326). Normally, sick notes go directly to Tangent. (TR 329).

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[6] *See* RX 2 for a complete copy of the National Master Freight Agreement and New York State Supplemental Agreement.

[7] "Booking off" refers to when a driver calls into Roadway and says he or she is not going to driver for some reason. (TR 237).

DISCUSSION

Wrobel alleges that Roadway violated § 31105(a)(1)(B)(i) of the STAA by terminating him for his refusal to drive. Specifically, Wrobel alleges that he refused to drive because of back pains and fatigue. According to Wrobel, his refusal to drive constituted protected activity, and thus Roadway violated the Act by terminating him. In contrast, Roadway alleges there is no STAA violation because Wrobel did not engage in protected activity. Rather, Roadway discharged Wrobel because he "book[ed] off for [his] scheduled Friday/Saturday shift. [He] extended [his] time off from 2 days to 4 days unexcused." (CX 2; RX 9).

The STAA provides in relevant part:

> (a) Prohibitions. - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, privileges or employment, because -
>
> > (B) the employee refuses to operate a vehicle because -
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health.

49 U.S.C. § 31105.

In order for the refusal to operate a commercial motor vehicle to be considered protected activity under § 31105(a)(1)(B)(i), the employee must inform the employer of the safety basis for his refusal to drive, *Paquin v. J.B. Hunt Transport, Inc.*, 1993-STA-44, slip op. at 3-4 (Sec'y July 19, 1994), and show that an actual violation of a regulation would have occurred. *Yellow Freight Systems v. Martin [Spinner]*, 983 F.2d 1195, 1199 (2d Cir. 1993). A reasonable belief that there was a violation of a regulation is not enough. *Yellow Freight System, Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1994). A violation of the Department of Transportation's fatigue rule would establish a STAA violation under this subsection. *Yellow Freight System, Inc. v. Reich [Hornbuckle]*, 8 F.3d 980, 984 (4th Cir. 1993). The fatigue rule states:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3 (1999).

For claims under the STAA, there is a three-prong shifting of the burden test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). First, the complainant must establish a prima facie case of retaliatory discharge. If the complainant can satisfy this burden, then there is a rebuttable presumption of discrimination. To rebut this presumption, the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its employment decision. If the respondent rebuts the prima facie case, then the complainant has the burden to prove, by a preponderance of the evidence, that the legitimate reasons proffered by the respondent were merely a pretext for discrimination, and that the protected activity was the reason for the action. *Shannon v. Consolidated Freightways*, 1996-STA-15, slip op. at 5 (ARB Apr. 15, 1998).

Complainant's *Prima Facie* Case

In order to establish a prima facie case under the Act, the complainant must show that (1) he engaged in protected activity under the STAA, (2) the respondent subjected him to adverse employment action, (3) the respondent was aware of the protected activity when it acted, and (4) the protected activity likely caused the respondent's adverse action. *Auman v. Inter Coastal Trucking*, Case No. 1991-STA-32, slip op. at 2 (Sec'y July 24, 1992); *Osborn v. Cavalier Homes of Alabama, Inc.*, Case No. 1989-STA-10, slip op. at 2 (Sec'y July 17, 1991).

In this case, the second element is met because Wrobel was subjected to an adverse employment action when he was discharged on June 2, 1999 (TR 54; CX 2; RX 9), which was later reduced to a 15-day suspension. (TR 178-180; CX 8). The third element is also met because Tangent, who made the decision to discharge Wrobel, testified he became aware that Wrobel was alleging he was ill when Wrobel called Roadway and spoke with Ryan around 2 p.m. on May 28, 1999. (TR 241). Finally, the Notice of Intent to Discharge was presented to Wrobel two days after he returned to work, and five days after he engaged in the protected activity. Due to the close proximity between the protected activity and the adverse action, it is likely that Wrobel's protected activity caused the adverse employment action. *See Johnson v. Roadway Express*, 1999-STA-5 at 13 (ALJ July 21, 1999)("The causal link requirement was met because [the complainant] was terminated a mere two days after he engaged in the protected activity and one day after he returned to work."). Therefore, this case turns on whether Wrobel engaged in protected activity on May 28, 1999, and, if so, whether Roadway discharged him in retaliation for that protected activity.

Activity by an employee is considered "protected activity" in the context of this statute when the employee refuses to operate a vehicle when operation would constitute a violation of any federal commercial motor vehicle safety rule, regulation, standard or order. If the employee is ill, and he communicates to the employer the nature and safety effects of his illness, then it is considered protected activity. For example, in *Johnson*, the complainant was off of work for six days with pneumonia. On the second day of his illness, the complainant went to the doctor, who diagnosed him with pneumonia and gave him a certificate to return to work after six days. *Id.* at 7. The complainant delivered the

work certificate to the employer on the fifth day of his illness. *Id.* at 11. The doctor's note stated the complainant was being treated for pneumonia, and two prescription receipts were also submitted, which indicated the complainant was prescribed medication to treat symptoms of pneumonia. *Id.* at 7. The ALJ found, based on the testimony of the complainant, the complainant's then fiancee, and the doctor, and the medical documentation, that the complainant was too ill to drive, and had he driven those days it would have been a violation of § 392.3. *Id.* at 7-8.

However, if there is evidence that the complainant is feigning illness, then there is no protected activity. *Waters v. Pacific Motor Trucking Co.*, 2001-STA-5 (ALJ Mar. 7, 2001). In *Waters*, the complainant had accepted a dispatch, but then went home because he had strained his back. *Id.* at 3. The respondent discharged the complainant, alleging he feigned illness because he did not want to drive south. *Id.* at 4. The ALJ found the complainant did not establish that he engaged in protected activity because he only refused to drive when he found out he had to drive south. In fact, when he called into dispatch, he requested the "longest load north." *Id.* at 4. Also, the medical note did not document any medical symptoms or treatments, but merely stated the complainant had strained his back and was unable to work February 16-20. *Id.* at 6. The ALJ found the complainant did not engage in protected activity, and thus there was no STAA violation.

In this case, Wrobel alleges he refused to drive because he was fatigued and had back pain, and argues that had he driven on May 28, 1999, it would have been a violation of § 392.3. Wrobel argues he has established that he engaged in protected activity because he informed the relay coordinator that he was ill and could not drive, and then brought Roadway a doctor's note when he returned to work on Monday. In contrast, Roadway argues Wrobel has not established that he engaged in a protected activity because he did not describe the nature of his illness or how his driving would be impaired and the doctor's note did not state what Wrobel was being treated for and what medication he was given. For the reasons listed below, I find that Wrobel did not engage in protected activity when he refused to drive on May 28, 1999.

First, when Wrobel returned to the Buffalo terminal at 5 a.m. on May 28, 1999, he did not inform the dispatcher or anyone else that he was fatigued and experiencing back pain. Wrobel testified he experienced back pains the night before and he was unable to sleep. If Wrobel was experiencing back pains severe enough to keep him awake, it would seem that Wrobel would communicate this discomfort to someone, even if it were just idle conversation with a co-worker. The fact that he did not communicate his discomfort to anyone suggests either there was no back pain and fatigue, or it was not serious enough to prevent him from driving on May 28, 1999.

Second, when Wrobel called Ryan at 2 p.m. on May 28, 1999, he did not initially communicate his back pain and fatigue. Rather, it was only after Ryan insisted that Wrobel be available to work his available hours did Wrobel inform Ryan that he was "sick." Again, if Wrobel had barely slept in the past two days, as he testified was the situation, it would seem that Wrobel would want to communicate the extreme fatigue and back pain to Ryan. However, Wrobel only informed Ryan that he was "sick"

when he realized he could not just take off the weekend because he was low on hours. Based on Wrobel's testimony of his subjective symptoms and his lack of communication to anyone at Roadway, I find that Wrobel has not established that he engaged in protected activity on May 28, 1999.

Third, when Wrobel did finally communicate his alleged fatigue and back pain to Ryan at 2 p.m. on May 28, 1999, he only stated he was "sick," but did not explain how he was "sick." Wrobel testified he was exhausted because he had barely slept the past two nights, he was experiencing back pains which were keeping him awake and he was possibly under the influence of a muscle relaxer (Wrobel's testimony is unclear as to whether or not he took a Carisprodol on May 28, 1999). However, Wrobel did not communicate any of this information to Ryan. Instead, he stated he was "sick" and ended the telephone conversation. Since Wrobel did not explain how he was sick and why he would not be able to drive, he did not show that an actual violation of § 392.3 would have occurred, as required in the Second Circuit under *Spinner*. Therefore, I find Wrobel did not establish that he engaged in protected activity on May 28, 1999.

Fourth, when Wrobel returned to work on May 31, 1999, he presented a doctor's note to Pagliei. He did not submit the note to Tangent, which is customary. Also, the note merely stated "excuse [Jozef Wrobel] from work from 5-28-99 to 5-30-99." It did not state the nature of Wrobel's illness or treatment. This note is very similar to the note in *Waters*, where the ALJ did not find a protected activity because the note "did not document any medical findings or symptoms." 2001-STA-5 at 6. Moreover, Tangent testified it was customary for drivers to submit a doctor's note which stated what the driver was being treated for and what medications were prescribed to the driver. Therefore, I find the doctor's note submitted by Wrobel fails to establish that Wrobel engaged in protected activity on May 28, 1999.

Finally, when Wrobel returned to work on May 31, 1999, he did not take a sick day, even though he was entitled to a sick day under the Buffalo terminal policy. According to Tangent, a driver can take their sick days individually, even though the union contract states that a sick day can only be taken after three missed work days. Tangent explained the contract means that Roadway cannot force a driver to take a sick day until he or she has missed three work days. In contrast, Wrobel testified his understanding of the contract was that he had to miss three days before he could take a sick day, and since he was only out for two days, he was not entitled to a sick day. I find Tangent's explanation of the union contract to be more credible. It is not logical that the union would negotiate a contract wherein a driver had to be out sick for three days before he was entitled to one paid sick day. Without interpreting the terms of the contract, I find Tangent's explanation of the sick leave policy to be more credible, and thus find that Wrobel could have taken sick days on May 28-29, 1999. Wrobel risked discipline when he decided not to take a sick day, even though one was available. Therefore, I find that Wrobel has not proven he engaged in protected activity on May 28, 1999.

In summary, I find that Wrobel has not proven by a preponderance of the evidence that he engaged in protected activity on May 28, 1999. However, at this point, I will assume *arguendo* that Wrobel has established a protected activity. Even if Wrobel was able to establish a prima facie case, he would not be able to rebut Roadway's legitimate, nondiscriminatory reason for discharge, and his claim will ultimately fail, as discussed below.

Respondent's Rebuttal

Once the complainant has established a prima facie case, there is a rebuttable presumption that the employer discriminated against the complainant. To rebut this presumption, the respondent must produce evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. 1999-STA-5 at 13. "The evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee." *Id.*(citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)). To rebut the presumption, the employer only has the burden of persuasion. For example, the respondent in *Johnson* met its burden by alleging the complainant was terminated because of his record of excessive absenteeism. *Id.* at 12. In this case, Roadway presented sufficient evidence to rebut Wrobel's prima facie case when it alleged Wrobel was discharged after a pattern of unexcused absences. (TR 289).

Complainant's Surrebuttal

For the complainant to ultimately prevail on his claim of discrimination, he must prove the reasons for discharge proffered by the respondent were merely a pretext for discriminatory animus. *Id.* at 12. However, when there are both legitimate and discriminatory reasons for discharge, then the dual motive analysis is applied. In this case, Wrobel alleges he was fired after he refused to drive because he was ill. Roadway alleges it fired Wrobel because he had numerous unexcused absences, which had the effect of extending his weekends. Since the parties have presented both a legitimate and discriminatory reason for the discharge, the dual motive analysis is applied.

Dual Motive Analysis

The dual motive analysis is applied when there are both legitimate and discriminatory reasons for an adverse employment action. Under this analysis, the respondent has the burden of production and persuasion to show that the complainant would have been disciplined or discharged even if he had not engaged in the protected activity. *Shannon,*1996-STA-15 at 6. If the respondent does not meet its burden, then there is a STAA violation. In *Johnson*, the respondent did not meet its burden to show that absent the protected activity it would have taken the same action (i.e. discharged the complainant) because the respondent presented no evidence to show that it would have fired the complainant absent his unavailability due to sickness. 1999-STA-5 at 14.

In contrast, if the respondent is able to meet its burden under the dual motive analysis, then there is no STAA violation. In *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999), the respondent prevailed because it produced evidence that the complainant would have been discharged even had he not engaged in the protected activity because of his poor work record. Specifically, the respondent pointed to the complainant's work record which contained about 50 warning letters over five and one half years for "speeding, driving an unsafe truck and misinforming the supervisor about the safety defect, being unavailable for work, violating the company's 48-hour rule, and reporting for work late." *Id.* at 3. Thus, the ARB affirmed the ALJ's decision that the respondent met its burden and that the complainant would have been fired for his poor work record, even had he not engaged in any protected activity. *Id.* at 13.

In this case, Roadway argues that it would have terminated Wrobel absent the protected activity on May 28, 1999 because he had numerous unexcused absences, which had the effect of extending his weekends. Roadway prepared a post-hearing comparative summary of drivers[8] which compared the eight drivers[9] who drove the Buffalo-to-Boston run from May 1998 to May 1999. This summary indicated that Wrobel's work record was outside of the norm of the other seven drivers on the Buffalo-to-Boston run. Of the seven other drivers, there were six who never had an unexcused absence and one driver who had two unexcused absences, compared to Wrobel who had twenty unexcused absences. (RX 13, p.7). Roadway offers this statistical evidence to show that Wrobel's conduct was outside of the norm of drivers for the Buffalo-to-Boston bid run, thus justifying its termination of Wrobel. I find this evidence substantiates Tangent's testimony that Wrobel was the only driver on the Buffalo-to-Boston run who had a pattern of extending his weekends. Moreover, I find this evidence is sufficient for Roadway to meet its burden of production and persuasion to prove that Wrobel would have been discharged absent the protected activity. It shows that Wrobel had excessive absenteeism, and that there was a non-discriminatory reason for Roadway's actions. Therefore, I find that Wrobel has failed to prove by a preponderance of the evidence that Roadway discriminated against him for engaging in protected activity, thus there is no STAA violation and Wrobel's claim should be dismissed.

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[8] The "Summary of Driver Comparison" was submitted by Roadway post-hearing and is now admitted as RX 13.

[9] There are ten drivers with a Buffalo-to-Boston run. During the hearing, I asked Mr. Tangent to only include those drivers who had the Buffalo-to-Boston run from May 1998 to May 1999. (TR 345-346). After reviewing the records, it was determined that only eight drivers had the Buffalo-to-Boston run (or a comparable run to a nearby city in Massachusetts) for the requisite period (RX 13, pp. 2-3), and thus Roadway's analysis only includes eight drivers.

RECOMMENDED ORDER

Accordingly, because I find that Complainant has not established a prima facie case and Respondent's discharge of Complainant did not violate the Act, I recommend that the Complainant's case be dismissed.

A
MICHAEL P. LESNIAK
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).